IMO of Anil Thomas
DOP Docket No. 2004-891
(Merit System Board, decided January 7, 2004)

Anil Thomas, a Senior Accountant with the City of Newark (City), represented by Daniel J. Zirrith, Esq., petitions the Merit System Board (Board) for back pay and counsel fees for the period of his immediate suspension.

The record indicates that on June 10, 2003, the petitioner was served with a Notice of Minor Disciplinary Action (NMDA) indicating that he was being suspended for two and one-half days on charges of conduct unbecoming a public employee. Specifically, a letter dated June 10, 2003 accompanying the NMDA explained that the petitioner was being suspended immediately for screaming at the top of his voice in the office, and indicated that he should report to work on June 13, 2003. On June 13, 2003, the petitioner was presented with a memorandum by his supervisor, the Court Director, stating that the petitioner would not be allowed to return to work until he underwent a psychiatric evaluation and a substance abuse evaluation. Thereafter, the City issued the petitioner a Preliminary Notice of Disciplinary Action (PNDA) dated June 23, 2003, which indicated the same charge and specification as the NMDA along with a charge of violating the City's residency ordinance. The PNDA indicated that the petitioner had been suspended since June 10, 2003, and sought the petitioner's removal. Subsequently, the petitioner was returned to pay status on July 21, 2003 and returned to work in a different City department effective July 28, 2003.

In the instant matter, the petitioner argues that the City's refusal to allow him to return to work following his two and one-half day suspension constituted an illegal immediate suspension. The petitioner contends that he should have received a PNDA within five days of the immediate suspension setting forth the charges and a statement of facts and evidence supporting the charges and the immediate suspension. The petitioner maintains that since the PNDA was issued 13 days after his immediate suspension, the suspension was invalid. Additionally, the petitioner asserts that the City did not meet the requirements of *N.J.A.C.* 4A:2-2.5 in immediately suspending him. In this regard, he argues that his conduct did not rise to the level requiring his immediate suspension. Further, the petitioner contends that the City failed to comply with the requirements of *Cleveland Board of Education v. Loudermill*, 470 *U.S.* 532 (1985) and *N.J.A.C.* 4A:2-2.5(b) because he was not given an explanation as to why he was being suspended or given the opportunity to object to the suspension. Moreover, the appellant argues that the PNDA raises charges for which he had already been disciplined. He claims that the public interest does not support an appointing authority disciplining a public employee twice for the same incident. In addition, the petitioner asserts that there

is a danger of immediate irreparable harm in that he is responsible for supporting his wife and three children, and that as a direct result of the five-week suspension without pay, his finances are in dire straits, which may lead to his eviction and the loss of his vehicle.

In regard to the incident of June 10, 2003, the petitioner claims that two co-workers in the Court Finance Section stood behind him, started pushing his chair and threatening him by stating "get out of here," and made other similar comments. Additionally, the petitioner believed one of these co-workers was holding a knife, and he yelled out once because he was scared by the sight of this knife. He explains that there is a history of his co-workers harassing him, which led to his being reassigned out of the Court Finance Section in 2000. Upon his return to the Court Finance Section in 2003, the petitioner asserts that the harassing behavior of his co-workers continued. In this regard, the petitioner describes his co-workers setting the thermostat to uncomfortable levels as harassing behavior. Further, the petitioner states that after complaining to the City about his co-workers' behavior, he was referred to a psychologist thorough the City's Employee Assistance Program (EAP). The petitioner submits a copy of the psychologist's report dated March 3, 2003, in which Dr. Michael Overland indicated that after five sessions with the petitioner that "Mr. Thomas otherwise came across as a serious intelligent individual who only was seeking relief from the alleged workplace abuse, so that he could continue to be a productive employee." The petitioner relies on this report to argue that he did not have a psychological problem and that he was cleared to work. Finally, the petitioner contends that he has been employed with the City since 1993 without any major disciplinary problems.[1]

In response, the City, represented by Carolyn A. McIntosh, Assistant Corporation Counsel, argues that on June 10, 2003, the petitioner's co-workers and supervisors were shocked at the petitioner's sudden and irrational outburst, and were fearful for their lives. In support of this contention, the City submits five certifications from the petitioner's co-workers and supervisors which indicate the same. Additionally, the City contends that per its letter dated July 22, 2003, and the July 25, 2003 response by the petitioner's counsel, the petitioner agreed to forgo a *Loudermill* hearing after being placed on a paid suspension. Further, the City claims that it had just cause in immediately suspending the petitioner, as it was needed to maintain the safety of City employees and order in the department. In this regard, the City argues that the petitioner's outburst took place over the course of several minutes and took the presence of two uniformed officers to alert the petitioner to the inappropriateness of his actions. Moreover, the City claims that the June 10, 2003 NMDA informed the appellant that he was being immediately suspended and that the June 13, 2003 memorandum notified the petitioner that his immediate suspension would continue pending a psychological and drug evaluation.

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[1] Department of Personnel records indicate that the petitioner was hired by the City effective May 24, 1993. Additionally, the petitioner's disciplinary record reveals a three-day suspension in March 1998 and a one-day suspension in March 2003.

Finally, the City contends that the petitioner has not provided any tangible evidence of irreparable harm.

CONCLUSION

N.J.A.C. 4A:2-2.5(a)1 provides that an employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. However, a Preliminary Notice of Disciplinary Action with an opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension. Additionally, *N.J.A.C.* 4A:2-2.5(b) states that where suspension is immediate under *N.J.A.C.* 4A:2-2.5(a)1, and is without pay, the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority.

N.J.A.C. 4A:2-1.2(c) provides the following factors for consideration in evaluating petitions for interim relief:

1. Clear likelihood of success on the merits by the petitioner;

2. Danger of immediate or irreparable harm;

3. Absence of substantial injury to other parties; and

4. The public interest.

Initially, in reviewing this matter, the Board notes that this petition is not a request for interim relief in the traditional sense, as the petitioner has been returned to work and no proceedings on the present matter are anticipated at the Office of Administrative Law. Regardless, the provisions of *N.J.A.C.* 4A:2-1.2(c) provide a framework for the Board to decide matters such as the present case.

In the instant matter, it is clear that the City suspended the appellant for two and one-half days for his conduct on June 10, 2003. The NMDA with the accompanying letter dated June 10, 2003 support this conclusion. The Board will not review the appropriateness of this suspension as this action constituted a minor disciplinary action in a local jurisdiction, which is not under the Board's purview. *See N.J.S.A.* 11A:2-16 and *N.J.A.C.* 4A:2-3.1(d). In the June 10, 2003 letter accompanying the NMDA, the City provided the petitioner a return to work date. At the time the petitioner returned to work, the City decided to extend his suspension without pay. This action constituted an immediate suspension. The

record clearly indicates that the immediate suspension was based on the City's belief that the petitioner needed both psychiatric and substance abuse evaluations. However, at the time that the immediate suspension without pay was initiated, the City had not scheduled the petitioner for these "required" evaluations. It merely handed the petitioner a copy of the City's Employee Assistance Program, presumably requiring the petitioner to schedule his own evaluations whenever possible. A valid option for the City, consistent with merit system law and rules, would have been to suspend the petitioner **with pay**, pending the expeditious scheduling and completion of appropriate expert evaluations. *See In the Matter of Anthony Recine* (MSB, decided March 10, 1998). However, in the instant matter the City chose to immediately suspend the petitioner without pay and without scheduling the appropriate evaluations. In essence, the City was making a medical and/or psychological determination without the benefit of any such evaluation. Therefore, the Board finds, based on the evidence in the record and the reason provided by the City, that it did not meet the standard for the immediate suspension of the petitioner without pay on June 13, 2003. Accordingly, the petitioner is entitled to back pay from June 13 to July 21, 2003.

Additionally, the petitioner has requested counsel fees pursuant to *N.J.S.A.* 11A:2-22, which provides that the Board may award reasonable counsel fees to an employee as provided by rule, and *N.J.A.C.* 4A:2-2.12, which provides that for disciplinary appeals, reasonable counsel fees are awarded where an employee has prevailed on all or substantially all of the primary issues in an appeal. In this regard, it is clear that the City's imposition of the improper immediate suspension was in violation of merit system law and rules and served to improperly separate the petitioner from his employment. Therefore, the petitioner has prevailed on the primary issue of his petition, and is entitled to an award of reasonable counsel fees. *See In the Matter of James Campbell* (MSB, decided January 11, 2000); *In the Matter of Abnathy Mason* (MSB, decided July 7, 1999). However, it is noted that the petitioner is only entitled to counsel fees regarding his attorney's actions in respect to his petition to the Board and not for representation prior to this petition.

ORDER

Therefore, it is ordered that petitioner's request for back pay be granted from June 13 to July 21, 2003. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned by the petitioner during this period. Proof of income earned shall be submitted to the City within 30 days of issuance of this decision. Further, the petitioner is entitled to reasonable counsel fees as described above. An affidavit in support of reasonable counsel fees shall be submitted to the City within 30 days of issuance of this decision.

In the event this Order is not fully complied with within 30 days of issuance of this decision, the Board orders a fine be assessed against the City in the amount of one hundred dollars ($100) per day beginning on the 31st day from the issuance

of this decision, continuing for each day of continued violation, up to a maximum of ten thousand dollars ($10,000).